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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 462

LEO ZAMARONI,
Petitioner,

v.

JAY G. PHILPOTT,
District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

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JAY G. PHILPOTT,
District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioner Leo Zamaroni prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on May 21, 1965.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is not reported and is printed in the Appendix hereto (p. 13).

JURISDICTION.

The judgment of the Court of Appeals was entered on May 21, 1965 (Appendix, p. 16). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

Whether the doctrine of **Elkins v. United States**, 364 U. S. 206, extends to civil proceedings in which the government seeks to assess tax deficiencies and penalties, so that a district director of internal revenue can be enjoined from using therein evidence illegally seized from taxpayer by state police officers.

A. Whether 26 U. S. Code, § 7421 (a), prohibiting suits to restrain assessment of any tax, likewise prohibits a suit to restrain use of unconstitutionally seized evidence in tax assessment procedures.

B. Whether 28 U. S. Code, § 2201, exempting controversies with respect to federal taxes from declaratory judgment actions, impliedly prohibits the district court from entertaining an action to restrain use of unconstitutionally seized evidence in a tax assessment procedure.

C. Whether a taxpayer, faced with the threatened use by the government of unconstitutionally seized evidence to determine a deficiency against taxpayer, must wait until the deficiency has been determined and paid and then raise his constitutional objections for the first time in

a suit for refund; or whether said taxpayer may prevent the use of said evidence in the first instance by an injunctive action similar in nature to a motion to suppress.

STATUTES INVOLVED.

Sections 7262 and 7421 (a) of the Internal Revenue Code of 1954 (26 U. S. C., §§ 7262 and 7421) and Section 2201 of the Judicial Code (28 U. S. C., § 2201) are printed in the Appendix to this Petition (p. 17).

STATEMENT.

This is an action brought by petitioner seeking to enjoin the District Director of Internal Revenue from using, in attempting to assess tax deficiencies against petitioner, items which were unlawfully seized from petitioner in violation of his rights under the Fourth, Fifth and Fourteeneth Amendments to the Constitution. The trial court sustained a motion to dismiss the complaint on the grounds that it did not have the power or jurisdiction to grant the relief sought (R. 7).

Because of the ruling below, the facts involved consist only of the complaint filed by petitioner and the allegations contained therein. This complaint stated that sometime after August 11, 1962, the defendant-respondent obtained certain books, records, papers, and documents from police officers of the State of Illinois (R. 1), which items were specifically described in said complaint (R. 2). It was further alleged that all of these items had been seized by said state officers from petitioner's premises on August 11, 1962, by means of an unlawful search and seizure in violation of petitioner's constitutional rights (R. 2). The complaint also asserted that respondent, as District Director of Internal Revenue, was using

(and intended to continue to use) those unlawfully seized items and the information contained therein as the basis for assessing tax deficiencies and penalties against petitioner claimed to be due under sections 4401 and 4411 of the Internal Revenue Code of 1954, and that such use of the items constituted an invasion of petitioner's rights under the Fourth, Fifth and Fourteenth Amendments (R. 2-3).

In other words, according to the complaint's allegations, Illinois officers unconstitutionally seized evidence from petitioner; they turned this evidence over to the District Director; the District Director is now using that evidence to assess tax deficiencies against petitioner.

The prayer for relief asks for return of the unlawfully seized items, and for an order enjoining the District Director from using said items or any information contained therein as the basis for assessing or proving any tax deficiencies or penalties against petitioner (R. 3).

A motion to dismiss was filed by respondent based on various grounds: lack of jurisdiction, sovereign immunity, adequacy of legal remedy, and the prohibitions of Section 7421 (a) of the Internal Revenue Code (which forbids suits to restrain the assessment or collection of any tax) (R. 4-6). The motion was sustained by the trial court in a brief order, which concluded that the Court had no jurisdiction to determine "what evidence may or may not be admissible in a future action not yet in being" (R. 7). The Seventh Circuit affirmed the trial court's action, on the grounds that the underlying policy of 26 U. S. C., § 7421 (a) and 28 U. S. C. 2201 prohibit the district court from entertaining such an action (Appendix p. 17).

REASONS FOR GRANTING THE WRIT.

1. The overriding issue in this case is one which must ultimately be resolved by this Court in order to assure uniform application and enforcement of the law relative to search and seizure. **Elkins v. United States**, 364 U. S. 206, of course, abolished the "silver platter" doctrine in federal criminal prosecutions, and excluded from use therein any evidence seized by state officers in violation of a defendant's rights against unreasonable searches and seizures. The question here presented, however, is whether the federal government (barred by **Elkins** from basing a criminal prosecution on such tainted evidence) can nevertheless use this evidence to impose civil liability and penalties by assessing tax deficiencies.

This issue has never as yet been decided by the Supreme Court, although the rapidly expanding scope of the Internal Revenue Department's activities makes obvious the probability of increasing frequency of the problem. If the "civil" use by the government of such evidence is sustained, a potent method has indeed been created to circumvent the sanctions heretofore imposed by the courts to discourage unlawful searches and seizures. The government, whenever it comes into possession of the fruits of an unlawful search, can merely by-pass the usual procedure of criminal indictment and seek to punish the alleged culprit by levying tax deficiency assessments based on the otherwise suppressible evidence. This would be possible in a large variety of cases, whenever the incriminating (and unlawfully seized) evidence showed an enrichment (unreported in tax returns) of the defendant. Even the more unsophisticated crimes (bank embezzlement, larceny, forgery, etc.), for which prosecution might be impossible because of the manner in which the evidence was obtained, might nevertheless be "punished" by as-

sessment of tax deficiencies and penalties based on the unlawful and presumably unreported gain to the perpetrator which such evidence would show. Thus, the government would be encouraged to employ unconstitutional searches and seizures, even though the fruits thereof are not usable in criminal prosecutions, to obtain ammunition for civil tax assessments.

The issue is squarely raised in the instant action, since the complaint very simply and concisely alleges the unlawful seizure of evidence by Illinois state officers, the transfer of such evidence to federal internal revenue officials, and the threatened use of the evidence by the district director to determine tax deficiences (R. 2-3). The relief sought consisted primarily of an injunction against the district director to prevent his use of the seized items in determining tax deficiencies. No other issue is raised by the pleadings. If indeed this problem is one whose resolution is essential to the future administration of justice, the instant case offers an ideal presentation of the question.

Admittedly the exclusionary rule has been traditionally applied primarily in criminal prosecutions. Yet only recently this Court noted that the rule would also apply to forfeiture proceedings, see **One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania**, 380 U. S. 693 (No. 294, October Term 1964, Decided April 29, 1965). There Mr. Justice Goldberg, speaking for the majority, pointed out that forfeiture of the automobile (worth about $1000.00) was a greater penalty than could have resulted from criminal conviction of the offender (a maximum fine of $500.00). In the instant case, a criminal prosecution of petitioner for failure to pay the proper wagering tax can only result in a maximum penalty of a $5,000.00 fine (Section 7262, Internal Revenue Code of 1954). Yet, obviously the tax deficiences plus interest and penalties, as deter-

mined by the district director's assessment procedure, could easily exceed that amount. Hence, the "civil" proceeding, just as in the **1958 Plymouth** case, might well involve liabilities far greater than the criminal prosecution. As the opinion therein noted:

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."
>
> 380 U. S. at p. 698.

That language, equally applicable to the instant case, expresses irrefutable logic. It further suggests that a close, careful examination ought to be given to the present matter, to determine whether such logic requires that the exclusionary rule should be applicable in tax assessment procedures.

If the district director in the instant case is permitted to proceed without judicial restraint, and to utilize the fruits of an unconstitutional search and seizure, the fears expressed in the landmark opinion of **Boyd v. United States**, 116 U. S. 616, will have been proven well-founded: that a government prosecutor, electing to waive indictment and proceeding civilly, might by such device "deprive the claimants of their immunities as citizens, and extort from them a production of their private papers." To prevent just such a possibility the **Boyd** decision was carefully and emphatically worded. If that case is to continue to be one of the guideposts of our search and seizure law, the instant matter should be reviewed and the issue resolved to harmonize with the established precedent.

2. The Seventh Circuit's attempt to circumvent the substantive issue and dispose of the case on procedural grounds has created serious and irreconcilable conflicts with decisions of other circuits and the Supreme Court. In this regard, the court below held that the "underlying policy" of Section 7421 (a) of the Internal Revenue Code, and Section 2201 of the Judicial Code, prohibits the injunctive relief sought by petitioner.

Section 7421 (a) simply prohibits any suit to restrain the **assessment** or **collection** of any tax. The instant complaint, however, sought only to restrain the use of certain evidence in the assessment procedure; it did not seek to restrain the assessment itself. The Seventh Circuit did not consider this distinction as material, and felt that a restraint as to the use of certain evidence was equivalent to a restraint of the assessment. In this regard, the holding below directly conflicts with numerous decisions from other circuits. In the Eighth Circuit, for example, in **Goodman v. Lane**, 48 F. 2d 32, injunctive relief was sought to prevent use of certain illegal evidence in a criminal prosecution; the proffered defense was that equity had no jurisdiction to stay criminal proceedings. The Eighth Circuit, rejecting that defense, pointed out the clear distinction between enjoining the use of certain evidence and enjoining the criminal proceeding itself. To the same effect is the Fourth Circuit opinion in **Austin v. United States**, 297 F. 2d 356, in which Chief Judge Sobeloff approved and adopted the **Goodman** reasoning, and held that an injunction could issue to restrain use of illegally seized evidence in a future criminal prosecution, and that such an injunction was not a restraint of the criminal proceedings themselves. Even this Court, in **Perlman v. United States**, 247 U. S. 7, upheld the right of an accused to obtain equitable relief, prior to indictment, to enjoin the use of illegally seized evidence. Each of the aforesaid decisions recognized the clear distinction

between enjoining the use of certain evidence and enjoining the proceeding itself. The Seventh Circuit, however, in its decision below, rejects such distinction and effectively equates the two, holding that an action to enjoin the use of certain evidence is tantamount to an action to enjoin the entire proceeding. In this respect, it squarely conflicts with the other circuits and the **Perlman** decision of this Court.

For the same reason, the holding below that Section 2201 of the Judicial Code prohibits this action raises the same conflict. Section 2201 prohibits declaratory judgment actions "with respect to Federal Taxes." But the instant complaint seeks no declaration as to federal taxes; it merely relates to the use of allegedly illegal evidence. The distinctions pointed out in **Goodman, Austin,** and **Perlman,** supra, would again seem to be clearly applicable, but have been ignored by the court below.

Significantly, the exact reasoning employed by the Seventh Circuit is remarkably similar to arguments made by the government in **DeMasters v. Arend,** 313 F. 2d 79, in the Ninth Circuit. That case, too, involved an attempt to enjoin a district director from using evidence allegedly obtained unlawfully. There the Ninth Circuit disposed of the contention in one brief paragraph:

> "We are also satisfied that this taxpayers' suit is neither one for declaratory judgment 'with respect to federal taxes' precluded by 28 U. S. C. A., § 2201; nor an action 'for the purpose of restraining the assessment or collection of any tax' precluded by 26 U. S. C. A., § 7421 (a)."
>
> 313 F. 2d at p. 85, f. n. 8.

This holding is most pertinent, since the **DeMasters** case involved a procedural situation identical to the instant case, i. e., a taxpayer seeking an injunction to prevent the

district director from using certain evidence in assessment of tax deficiencies. The Seventh Circuit opinion below, therefore, is in exact diametric opposition to the Ninth Circuit, and creates an irreconcilable conflict. Only if certiorari is granted herein can that conflict be resolved.

3. As an alternate ground for its ruling, the appellate court below suggests that the instant action is premature, and that "all questions touching on the weakness of the Director's case" should be raised after the administrative function is completed and the matter is before the court for review (Appendix, p. 15). Once again, however, in attempting to dispose of the issue on technical procedural grounds, the court below runs afoul of the established precedent in other federal jurisdictions. The opinion in **Perlman v. United States**, 247 U. S. 7, 13, is quite emphatic in holding that the equity powers of the court are available to enjoin future use of illegally seized evidence, **before** any indictment or case is pending. To the same effect is **Austin v. United States**, 297 F. 2d 356 (Fourth Circuit); **In re Fried**, 161 F. 2d 453 (Second Circuit); and **Foley v. United States**, 64 F. 2d 1 (5th Circuit). While these decisions admittedly involve criminal prosecutions, no reason is suggested for any different rule if the threatened action is civil in nature (once it is determined that the exclusionary rule is applicable at all).

Furthermore, if the Seventh Circuit's suggested procedure is followed, petitioner's right to object to the illegal evidence would disappear entirely. In this particular situation, the only possible future court review of the district director's assessment would be by a suit for refund (after payment of the tax) or by appeal to the Tax Court; in either instance, the entire burden rests on petitioner to prove the impropriety of the director's assessment. But once petitioner offers any proof on the

issue, the illegally seized evidence becomes nevertheless admissible for purposes of impeachment; **Walder v. United States**, 347 U. S. 62; **Compton v. United States**, 334 F. 2d 212. Thus, if the Seventh Circuit's opinion is correct, petitioner is utterly without remedy to prevent the government's use of the seized items; he cannot conceivably sustain the burden of proof (in a refund suit or Tax Court appeal) without offering evidence, yet his offer of evidence opens the door to the use of the illegally seized items.

It appears that the Court below, in its obvious anxiety to avoid coming to grips with the real substantive issue (i. e., whether the exclusionary rule should be applicable in this type of case) has injected procedural objections which have confused the situation, conflicted with decisions of other circuits and the Supreme Court, and created a precedent which ought not to stand unreviewed by this Court.

The simple and only real issue in this case is whether unconstitutionally seized evidence may be used in the first instance by the government in arriving at a tax assessment and deficiency and thus shift to the taxpayer the problem of winning his case without opening the door for its use by the government; in a nutshell the question is whether or not the government can employ constitutionally prohibited means to checkmate a taxpayer. That this is an issue which is still in doubt is amply illustrated by the review of conflicting decisions set forth in the opinion in **Compton v. United States** (supra, at p. 217, f. n. 11). Any attempt to avoid this issue in the instant case, in which it has been squarely and directly raised, can lead only to further confusion and uncertainty. The opinion below has accomplished just that, and should be reviewed by this Court if clarification in this all-important field is ever to be achieved.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX.

OPINION BELOW.

United States Court of Appeals
For the Seventh Circuit.
September Term, 1964—April Session, 1965.

No. 14952.

Leo Zamaroni,
Plaintiff-Appellant,
v.
Jay G. Philpott, District Director of Internal Revenue,
Defendant-Appellee.

On Appeal from the Order of the United States District Court for the Southern District of Illinois.

May 21, 1965.

Before Castle, Kiley and Swygert, Circuit Judges.

Castle, Circuit Judge. The plaintiff-appellant, Leo Zamaroni, commenced this action in the District Court seeking to enjoin the defendant-appellee, District Director of Internal Revenue, from using certain items or information derived therefrom as the evidentiary basis for asserting or proving any tax deficiencies against the plaintiff. Plaintiff's complaint alleges that the items were seized

from plaintiff's premises by State officers by means of an unlawful search and seizure in violation of plaintiff's constitutional rights, and that the defendant has used and intends to continue to use said books, records, papers, and documents, and the information contained therein, as the basis for assessing tax deficiencies and penalties against plaintiff for taxes claimed due under Sections 4401 and 4411 of the Internal Revenue Code of 1954 (26 U. S. C. A., § 4401 and § 4411).

The District Director moved to dismiss the action upon the grounds of lack of jurisdiction and failure of the complaint to state a claim upon which relief may be granted.[1] The District Court dismissed the suit for lack of jurisdiction, stating in its judgment order:

> ". . . [I]t is not within the province of the judiciary to entertain an action which seeks a declaration that certain evidence cannot be utilized by a District Director of Internal Revenue in determining federal tax liability, nor does the Court believe that it has jurisdiction in this action to declare what evidence may or may not be admissible in a future action not yet in being concerning plaintiff's liability for the federal taxes herein involved . . ."

We agree with the disposition the District Court made of the action. Whatever impact the exclusionary rule announced in **Elkins v. United States**, 364 U. S. 206, may have with respect to civil actions or proceedings,[2] an is-

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[1] The motion asserted lack of jurisdiction on the grounds the action was an unconsented to suit against the government, it sought declaratory relief contrary to 28 U. S. C. A., § 2201, and it sought to enjoin the assessment of a tax contrary to 26 U. S. C. A., § 7421 (a). The motion asserted lack of equity and failure to state a claim because of plaintiff's failure to allege irreparable injury or inadequacy of legal remedy.

[2] The exclusionary rule of *Elkins* was formulated in an exercise of "the Court's supervisory power over the administration of *criminal* justice in the federal courts". 364 U. S. 206, 216 (Emphasis supplied).

sue we need not here resolve, the underlying policy manifested by the provisions of both 26 U. S. C. A., § 7421 (a) and 28 U. S. C. A., § 2201[3] leads us to the conclusion that collateral determination of the admissibility of evidence in an administrative tax proceeding or investigation is not a proper sphere for injunctive intervention in the exercise of equitable jurisdiction. We have had occasion to point out "[w]ith reference to the assessment and collection of federal taxes, the courts have only a limited area in which to operate". **Balistrieri v. United States**, 7 Cir., 303 F. 2d 617, 620. And, in the instant matter we agree with the observation made in **Campbell v. Guetersloh**, 5 Cir., 287 F. 2d 878, 881, that:

> "All questions touching on the weakness of the Director's case and the difficulty of proof will be before the courts for their review once the administrative function is completed. That is when the court may first come upon the scene; not before the investigation has been completed."

The judgment order of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[3] § 7421 (a) provides: "Except as provided in [sections not here relevant], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

§ 2201 provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such" (Emphasis supplied).

JUDGMENT.

United States Court of Appeals
For the Seventh Circuit.

Chicago, Illinois 60610.

Friday, May 21, 1965.

Before

Hon. Latham Castle, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

No. 14952

Leo Zamaroni,
Plaintiff-Appellant,
vs.
Jay G. Philpott, District Director of Internal Revenue,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

STATUTES.

26 U. S. C., §§ 7421 (a) and 7262, are as follows:

§ 7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) Tax—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

§ 7262. Violation of Occupational Tax Laws Relating to Wagering—Failure to Pay Special Tax.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

28 U. S. C., § 2201, is as follows:

§ 2201. Creation of Remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.